

## Notice of Decision and Reasons for Decision

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Applicant:	'AM4'
Agency:	Yarra City Council
Decision Date:	19 September 2019
Exemption considered:	Section 33(1)
Citation:	'AM4' and Yarra City Council ( <i>Freedom of Information</i> ) [2019] VICmr 112 (19 September 2019)

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FREEDOM OF INFORMATION – council documents – council meetings – personal affairs information of non-executive agency officers

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the document to the Applicant.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
19 September 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to documents relating to the dates and locations of meetings and communications between the Agency and Developers and their agent relating to two planning applications.
2. In its decision, the Agency identified a document falling within the terms of their request. It decided to grant access to the document in part.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. By email dated 24 August 2019, the Applicant advised OVIC they only seek review of the Agency's decision to exempt the names of Agency officers in the document.
5. Accordingly, my review relates to the personal affairs information of Agency officers to which the Agency denied access and the personal affairs information of other third parties is not relevant to my review and will remain deleted in accordance with section 25.
6. I have examined a copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request; and
  - (b) the Applicant's submission dated 23 March 2019 and correspondence with OVIC staff.
9. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

### Review of exemptions

10. The Agency relied on the exemption under section 33(1) to refuse access to parts of the document. The Agency's decision letter sets out the reasons for its decision.

### **Section 33(1)**

11. A document is exempt under section 33(1) if two conditions are satisfied:
  - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

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<sup>1</sup> Sections 33(1) and (2).

12. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>2</sup>
13. In deciding whether the exemption applies, it is necessary to determine whether disclosure of personal affairs information would be unreasonable in the circumstances.
14. Consideration of whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
15. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.<sup>3</sup>
16. The nature of disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.<sup>4</sup>
17. I note the decision of *Victoria Police v Marke*,<sup>5</sup> in which the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'. The Court further held, '[t]he protection of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.<sup>6</sup>
18. I also note the decision of *Coulson v Department of Premier and Cabinet*<sup>7</sup> (**Coulson decision**), in which the Victorian Civil and Administrative Tribunal (**VCAT**) held that whether or not an agency staff member's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.
19. Therefore, the proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.<sup>8</sup>
20. In this case, I have considered the following factors<sup>9</sup> when determining if the release of the personal affairs information in the documents would be unreasonable in the circumstances:
  - (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
  - (b) the extent of which information is publicly available;
  - (c) the circumstances in which the information was obtained;
  - (d) whether any public interest would be promoted by disclosure; and
  - (e) whether the individual to whom the information related consents or objects to the disclosure.

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<sup>2</sup> Section 33(9).

<sup>3</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

<sup>4</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>5</sup> [2008] VSCA 218 at [76].

<sup>6</sup> [2008] VSCA 218 at [79].

<sup>7</sup> *Review and Regulation* [2018] VCAT 229.

<sup>8</sup> [2008] VSCA 218 at [104].

<sup>9</sup> A number of these factors were identified in *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

21. I have also considered the requirements of section 33(2A) that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.

*Applicant's submission*

22. The Applicant submitted the personal affairs information of the Agency officers should be released for the following reasons:
- (a) The Applicant is of the view that access to this information will allow [them] to -  
make an assessment as to whether there is a pattern in the approach taken by particular Planning Officers that is leading to advice to Developers and recommendations to Council that are inconsistent with the planning policies of the Council.
  - (b) The Applicant is of the view advice provided to Developers and the Council from Planning Officers should be publicly available.

*Does the document contain personal affairs information?*

23. The document subject to review is a list containing:
- (a) dates of meetings;
  - (b) location of meetings;
  - (c) names of the attendees to the meetings
  - (d) position titles, for Agency officers only; and
  - (e) company name.
24. I am satisfied the document includes personal affairs information comprising the names of Agency officers who hold the following positions:
- (a) [position title];
  - (b) [position title];
  - (c) [position title];
  - (d) [position title]; and
  - (e) [position title].

25. The Agency did not redact the above position titles from the document.

*Would disclosure of the personal affairs information be unreasonable?*

26. Having reviewed the document and on the information before me, I have decided it would not be unreasonable to disclose the personal affairs information of the Agency officers in the circumstances of this matter, for the following reasons:
- (a) While I acknowledge planning applications can be sensitive in nature, the personal affairs information of the Agency officers in the document subject to review is not particularly sensitive.

- (b) I also note the names of the Agency staff the Applicant is seeking are publicly available on the Agency's website. The fact this information is publicly available weighs in favour of release of the personal affairs information.
- (c) The Agency officers at that time had public facing roles in the handling of the applications and directly dealt with the Developer's agents, residents and objectors, as evidenced in the documents subject to review.
- (d) The information under review was obtained and included in the document in the course of the Agency officers' usual work duties and responsibilities in administering the Agency's planning functions under the law.
- (e) I accept the Agency officers were not the ultimate decision makers in relation to the planning applications. However, while the fact an agency officer is not the responsible decision maker may be relevant, it is not necessarily determinative.
- (f) In this matter, I do not place significant weight on the fact the Agency officers were not in decision making roles, but rather played a public facing role in the handling of the applications prior to their determination by the Internal Developments Approvals Committee. This reflects their usual work duties and responsibilities as public sector employees in administering the Agency's planning functions under the law. As such, I consider the personal information in the document concerns their professional roles rather than their personal or private lives.
- (g) I note the Agency's obligation to consult under section 33(2B), however, I have not been advised consultation has taken place in this matter. While there is no information before me regarding the views of Agency officers themselves as to the release of their personal affairs information, in the circumstances of this matter, I do not consider the Agency officers would have reasonably objected to the release of their personal affairs information in the document. In any case, any objection to disclosure, while a relevant consideration, would not be wholly determinative of whether disclosure would be unreasonable in the circumstances.

27. Accordingly, I am not satisfied the personal affairs information in the document subject to review is exempt under section 33(1).

***Deletion of exempt or irrelevant information***

- 28. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
- 29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>10</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.<sup>11</sup>
- 30. I have considered the effect of deleting exempt and irrelevant information from the document. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited document would retain meaning.

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<sup>10</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>11</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

## **Conclusion**

31. On the information available, I am satisfied that the exemption in section 33(1) does not apply to the personal affairs information of Agency officers in the document and this information should be released.
32. Personal affairs information relating to non-Agency staff is irrelevant to the review and is to remain deleted.
33. As it is practicable to edit the document to delete irrelevant information, I have determined to grant access to the document in part.

## **Review rights**

34. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>12</sup>
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
37. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
38. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>15</sup>

## **Other matters**

39. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
40. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.<sup>16</sup>

41. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.<sup>17</sup>
42. On balance, I am satisfied it is practicable to notify those individuals of their right of review.

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<sup>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and (3FA).

<sup>16</sup> *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

<sup>17</sup> *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

***When this decision takes effect***

43. I have decided to release documents that contain information relating to the personal affairs of third parties.
44. The relevant third parties will be notified of my decision and are entitled to apply to VCAT for a review within 60 days from the date they are given notice.
45. For that reason, my decision does not take effect until that 60 day period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

**Annexure 1 – Schedule of Documents**

<b>Document No.</b>	<b>Date of Document</b>	<b>Document Description</b>	<b>Number of Pages</b>	<b>Agency's Decision</b>	<b>OVIC Decision</b>	<b>OVIC Comments</b>
1.	undated	Meeting Details	1	Released in part Section 33(1)	Release in part Sections 25  This document is to be released to the Applicant with the names of non-Agency staff deleted in accordance with section 25 as this information is irrelevant.	Section 33(1): The reasons for my decision are set out above.